UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 07-23355-CIV-GOLD/MCALILEY

MONIKA ROZANSKA,

Plaintiff,

v.

PRINCESS CRUISE LINES, LTD. (CORP.),

Defendant.
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ORDER DENYING MOTION TO DISMISS

1. Introduction

THIS CAUSE is before the Court on the Defendant's Motion to Dismiss [DE 6] the Plaintiff's Complaint [DE 1]. Plaintiff, a Polish Citizen, was a crew member on board a Princess vessel when she became aware of a lump in her right breast. In a lengthy complaint, she claims the Defendant is liable under the Jones Act, 46 U.S.C. Section 30104 ("Jones Act"), and United States general maritime law, for negligence for failure to diagnosis, and properly treat, her breast cancer which she developed while on board the Princess vessels (Count 1); by not providing maintenance and cure (Count 2), and by failing to facilitate insurance available insurance coverage (Count 3). In turn, Defendant, Princess Cruise Lines, seeks to dismiss, pursuant to F.R.C.P. 12(b)(3) and (6), based on (1) a forum selection clause in the employment contract; (2) the doctrine of *forum non conveniens*; (3) the improper pleading of a maintenance and cure count with the Jones Act negligence claim, and (4) for failing to set forth a legally cognizable claim for not facilitating purportedly available insurance coverage. I conclude that none of the

Defendant's arguments have merit and deny the motion to dismiss. I start with the *forum non conveniens* argument after discussing the background of the case.[1]

2. Background

For this Motion to Dismiss, the relevant facts as alleged in the Complaint and from the record are as follows:

Defendant Princess Cruise Lines ("Princess") was the legal owner, operator, and/or manager of, and/or maintained and controlled, the Carribean Princess and Golden Princess. Compl., 3-4. Defendant Princess is a Bermuda company. Employment Agreement [DE 6-2], Art. 2. Plaintiff Rozanska was born in Poland, and Poland is her home country. Affidavit [DE 16-2] at ¶ 2; Compl. at 26. Plaintiff was employed by Defendant as a waitress aboard the Carribean Princess and the Golden Princess. Compl. at 6. Plaintiff's employment agreement with Defendant Princess provides, in part:

> Any disputes relating to or in any way arising out of this Agreement or any crew member's service on board a vessel shall be governed exclusively by the laws specified in the Seaman's Collective Bargaining Agreement or government mandated scheme. In the absence of such an Agreement, such disputes shall be governed by the Laws of Bermuda. Venue shall be exclusively limited to that specified in any Collective Bargaining Agreement or government mandated scheme. In the absence of such Agreement, venue shall exclusively be limited to Bermuda, the flag country or the country of the crew member's citizenship.
> Employment Agreement, Art. 14

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[1]. Because Defendant moves to dismiss based on the forum selection clause for improper venue, the court may properly consider evidence outside the Complaint without converting the motion to dismiss to a motion for summary judgment. See *Wai v. Rainbow Holdings*, 315 F.Supp.2d 1261, 1268 (S.D. Fla. 2004) (Altonaga, J.); see also *Wilson-Cook Med., Inc. v. Wilson*, 942 F.2d 247, 251 (4th Cir. 1991) ("[c]onverting a motion to dismiss into a motion for summary judgment, of course, applies only to a motion pursuant to Rule 12(b)(6).")

Plaintiff Rozanska worked for Defendant for successive, but not continuous, work periods beginning in or around 1999 and including a work period in 2003. Id. at 11-14. During Plaintiff's work period in 2003, she worked for Defendant on the Golden Princess. Aff. at 13. On or about May 11, 2003, Plaintiff presented complaints that included a lump in her breast to the Golden Princess' Ship's Medical Centre and saw Dr. Lana Strydom. Compl. at 15. Dr. Strydom referred Plaintiff on or about May 11, 2003 to Dr. Rolovos in Athens, Greece when the vessel was at port there. Id. at 16. Dr. Rolovos diagnosed Plaintiff on or about May 11, 2003 with probably fibroadenoma and prescribed a follow-up biopsy for approximately 14 days later. Id. at 17. In addition, a fine needed aspiration of the breast nodule was done and analyzed, and the analyzing physician recommended that a biopsy was required. Id. at 20. Although this recommendation made its way to the Ship's Medical Centre and Dr. Strydom, no one affiliated with Defendant, including Dr. Strydom or anyone else with the Ship's Medical Centre, followed up with making provision of this biopsy. Id. at 22. Instead, Defendant led Plaintiff to believe that she could and should wait to have the biopsy after her contract aboard the Golden Princess was complete. Id. at 23. While Plaintiff was aboard the Golden Princess in 2003, it traveled through Europe and stopped in New York, where Plaintiff disembarked and signed off. Aff. at 13.

Plaintiff much later discovered that she had developed breast cancer in May 2003, and that this recommended biopsy would have evidenced that fact. Compl. at 25. In October 2003, after Plaintiff had recently been discharged from her contract of employment with Defendant, Plaintiff sought a biopsy in her home country of Poland. Id. at 26. Plaintiff had been signed off on "vacation time" at the end of her contract, as opposed to medical,

even though Defendant had not facilitated the biopsy and no physician had declared Plaintiff to be at maximum medical cure. Id. Plaintiff's Polish doctors apparently failed to perform their biopsies correctly and failed to diagnose Plaintiff's cancer through February 2004. Id. at 32-33.

Plaintiff began her next contract of employment with Defendant Princess, and this term lasted from approximately March 15, 2004 until October 23, 2004, when she was signed off for vacation again. Id. at 39. Before Plaintiff began that term in March 2004, she had to undergo Defendant's mandated Medical Examination for Seafarers as a condition of further employment. Id. at 36. Plaintiff was sent by Defendant to Defendant's affiliated physician, Dr. Leninsky, for this Examination on or about February 18, 2004. Id. at 37. Dr. Leninsky failed to instruct Plaintiff or Defendant Princess and Plaintiff should have follow-up biopsy work within a few months at most, as opposed to waiting till the end of her contract. Id. at 38. For Plaintiff's 2004 work period with Defendant, Plaintiff worked aboard the Caribbean Princess, and this ship stopped at Port Everglades in Fort Lauderdale, Florida ever Saturday. Aff. at 14.

After the end of Plaintiff's contract in 2004, Plaintiff returned to Poland where she received medical treatment and then was hospitalized in January 2005 for the removal of a tumor from her right breast. Compl. at 40-41. Plaintiff subsequently required surgery to remove her breast, chemotherapy, radiation, and hormonal therapy. Id. at 44.

Or on about July 26, 2005, a doctor issued a certificate indicating that Plaintiff was unable to work for two years due to illness, and Plaintiff wrote to Defendant Princess on or about July 26, 2005 to inform Defendant that she would not be able to rejoin the Princess ships because she was sick. Id. at 46-47. Greg Fisher responded by letter to

Plaintiff on behalf of Defendant to acknowledge receipt of her letter and explain what Plaintiff should do once her health issues were resolved. Id. at 48. From October 2005 to April 2007, Plaintiff wrote five emails to Greg Fisher regarding her desire to make an insurance claim. Id. at 49-52. When Fisher finally responded in April 2007, he informed Plaintiff that there was no record of Plaintiff visiting the medical center for stress or any complaints of illness during her last contract aboard Caribbean Princess, which ended in October 2004, and he advised Plaintiff that because she became ill between contracts, the Solari Insurance Policy was the only source of coverage available to her in relation to her employment with Defendant Princess. Id. at 56. In May 2007, Plaintiff subsequently received an email from Michele Rabe, employee relations manager, which reiterated the findings in Greg Fisher's email, stated that Princess considered the matter closed, and informed Plaintiff that she could submit the dispute to binding arbitration in Bermuda. Id. at 59. In numerous email exchanges, employees of Defendant and employees of Solari Insurance informed Plaintiff that they did not have any relevant medical records from her, that her records had not been sent to the insurance company, and that it was her responsibility to contact Solari within the required time frame.

3. Applicable Standard

On a motion to dismiss, the court accepts a complaint's well-pleaded allegations as true. *Hoffend v. Villa (In re Villa)*, 261 F.3d 1148, 1150 (11th Cir. 2001). The court construes the pleadings broadly and views the allegations in the complaint in the light most favorable to the plaintiff. *Watts v. Fla. Int'l Univ., et al.*, 495 F.3d 1289, 1295 (11th Cir. 2007).

A motion to dismiss based on choice of forum is brought properly under Federal

Rule of Civil Procedure 12(b)(3) as a motion to dismiss for improper venue. On such a motion, the court may consider matters outside the pleadings, "particularly when the motion is predicated upon key issues of fact." *Webster v. Royal Caribbean Cruises, Ltd.*, 124 F.Supp. 2d 1317, 1320 (S.D. Fla., 2000); see *Transmirra Prods. Corp. v. Fourco Glass Co.*, 246 F.2d 538-39 (2d Cir. 1957) (resolving motion to dismiss for improper venue on affidavits, answers to interrogatories, and a deposition, rather than by full trial). In addition, on a 12(b)(3) motion to dismiss, the court may consider matters outside the pleadings without converting the motion to dismiss to a motion for summary judgment. *Wai v. Rainbow Holdings*, 315 F.Supp.2d 1261, 1268 (S.D. Fla. 2004); see also *Wilson-Cook Med., Inc. v. Wilson*, 942 F.2d 247, 251 (4th Cir. 1991) ("[c]onverting a motion to dismiss into a motion for summary judgment, of course, applies only to a motion pursuant to Rule 12(b)(6).")

Although the court does not analyze the probability of actual proof of the complaint's allegations on a motion to dismiss, a plaintiff must allege "'enough factual matter (taken as true) to suggest' the required element." *Watts*, 495 F.3d at 1295. Under the law of this Circuit, the pleading must create "plausible grounds to infer." *Id.* Thus, a claim will survive a motion to dismiss if it identifies "facts that are suggestive enough to render [the element] plausible." *Id.* at 1296 (quoting *Bell Atlantic*, 127 S.Ct. at 1965).

4.. *Forum Non Conveniens* Argument

The law on the doctrine of forum non conveniens is well-established and set forth in *Memreno v. Costa Crociere, S.P.A.*, 425 F.3d 932 (11th Cir. 2005); *Fantome, S.A. v. Frederick*, 2003 WL 23009844 (11th Cir. Jan. 24, 2003), and in *Williams v. Cruise Ships*

Catering, 299 F.Supp.2d 1273 (S.D.Fla. 2003). Under these cases, the first essential question is whether American law, namely the Jones Act, is applicable to the claim. If the Jones Act applies, the case should not be dismissed based on *forum non conveniens*. *Szumlicz v. Norwegian America Line, Inc.,* 698 F.2d 1192, 1195 (11th Cir. 1983). In deciding this question, the Eleventh Circuit has applied the non-exhaustive factors set forth by the United States Supreme Court in *Lauritzen v. Larsen,* 345 U.S. 571, 583-91 (1953) and in *Hellenic Lines Ltd. v. Rhoditis,* 398 U.S. 306, 308-09 (1970). These factors include (1) the place of the wrongful act; (2) the law of the ship's flag; (3) the allegiance or domicile of the injured seaman; (4) the allegiance of the shipowner; (5) the place where the shipping articles were signed; (6) the accessibility of the foreign forum; (7) the law of the forum, and shipowner's based of operations.

Here, while several of the *Lauritzen* factors weigh against the application of American law,[2] the eighth *Rhoditis* factor significantly predominates in Plaintiff's favor. The is conclusion is based upon the undisputed facts that Defendant's principle place of

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[2] In this case, Defendant argues that seven of the eight factors favor it: (1) the alleged medical malpractice and all subsequent treatment occurred in Greece and/or Poland; (2) the vessel sails under the flag of Bermuda; (3) the Plaintiff is a Polish citizen; (4) the Defendant is a Bermuda Corporation; (5) the terms of the employment contract were presented to the Plaintiff outside the United States; (6) the Courts of Bermuda or Poland is an accessible forum; and (7) the law of Bermuda is specifically contracted in the employment contract. The Plaintiff counters by arguing that the law of the flag and the place of incorporation should be given less weight because, given the nature and extent of operations in the United States, both serve only as a flag and place of convenience, and because Bermuda has no law equivalent to United States law on maintenance and cure and the Jones Act. Plaintiff's argument has merit. I conclude that the first, third and fifth factors favor the Defendant, but I place little weight in favor of the Defendant on the remaining factors. I do not need to weigh and balance these other factors, however, because the eighth factor, the place of operation, substantially predominates and outweighs all other factors.

business is located in the United States; the two Princess ships stop at ports-of-call in the United States, including in Ft. Lauderdale, Florida, and the Defendant operates a substantial warehousing operation in Ft. Lauderdale to service the Princess ships. None of these facts are in dispute. As noted in *Membreno*, "[I]f the defendants have a substantial base of operations in the United States, this factor can alone justify the application of United States law." *Id.,* 425 F.3d at 936. Given the nature and extent of the Defendant's substantial place of business in California, and the nature of its warehousing and support facilities operated in Ft. Lauderdale, Florida, to service the Princess vessels, I conclude that this factor out weighs the other factors, and, therefore, United States law applies.[3] See also *Matuszevoska v. Princess Cruise Lines, Ltd.*, Case No. 06-26975-CIV-ALTONAGA (S.D.Fla. Order of February 12, 2007)(finding U.S. law applicable because Princess's base of operations was in United States).

5. The Forum Selection Clause

The Defendant contends that the case is governed by the forum selection clause set forth in Article 14 of the terms and conditions of "Princess Cruises Principal Terms of Employment," (DE 6, Exhibit A)(See Background, page 2 above), and, according to the Defendant, venue is appropriate in Poland or Bermuda, but, in either case, the Laws of

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[3] I need not proceed with the remaining *forum non conveniens* analysis given my finding that the law of the United States applies (i.e. that an adequate alternative forum is available, that the public and private factors weigh in favor of dismissal, and that Plaintiff can reinstate her suit in the alternate forum without undue inconvenience or prejudice. *Williams*, 299 F.Supp.2d at 1277 ("If the court determines that United States law applies, the case should not be dismissed for *forum non conveniens*. If the court determines that United States law does not apply, it shall then examine the traditional considerations of *forum non conveniens* to determine whether the court should exercise its discretion and decline to assert jurisdiction over the case.").

Bermuda shall govern. In support, Defendant cites to cases holding that forum selection clauses are *prima facie* valid and should not be set aside unless the party challenging enforcement of such a provision can show its is "unreasonable" under the circumstances. *The Bremen v. Zapata Off Shore Co.,* 407 U.S. 1 (1972). A forum selection clause is unreasonable if "(1) the incorporation into the contract was the result of 'fraud, undue influence, or overreaching bargaining power; (2) the selected forum is 'so gravely difficult and inconvenient' that the complaining party will for all practical purposes be deprived of its day in court; or (3) enforcement of the clause would contravene a strong public policy of the forum in which the suit is brought." *Id.* at 18. The Supreme Court characterized Plaintiff's burden in this regard as a "heavy one." *id.*

While Defendant's general statement of law is correct, I nonetheless conclude that Plaintiff has met its "heavy burden" in this case . I find the forum selection clause to be inapplicable for several reasons. First, a different conclusion is warranted based on *Rhoditis*. Given the facts and circumstances here [namely that the Defendant's headquarters and substantial base of operations is located in the United States, the Princess vessels have ports-of-call in the United States, and the Defendant operates a substantial support operation in Florida for the Princess ships], the Defendant is a Jones Act employer, and the Plaintiff should be able to sue it under the Jones Act in a United States Court. Otherwise, as noted in *Rhoditis,* it would give shipowners who, for convenience, incorporate in foreign jurisdictions and register their vessels under foreign flags, but whose business is nonetheless substantially American, a distinct advantage over United States corporations and U.S. flagged vessels.

Rhoditis involved a Greek seaman, who was employed by a Greek corporation on board a Greek flagged vessel pursuant to a Greek employment contract which contained a forum selection and choice of law provision mandating litigation in the Greek courts under Greek law. More than 95% of the Hellinic Lines' stock was owned by a Greek citizen who was a permanent resident of the United States. The company's headquarters and base of operations was in the United States. The seaman was injured in the United States, which, admittedly, is not the case here. Nonetheless, I do not find this fact alone to be compelling when weighed against the Defendant's "substantial base of operations" in the United States. See *Pavlou v. Ocean Traders Marine Corp.*, 211 F.Supp. 320, 322 (S.D.N.Y. 1962)(cited in *Rhoditis* and stating "... this issue [whether the plaintiff signed an employment agreement with a forum selection and choice of law clause] would not be determinative of this case for *if other circumstances make the law of the United States applicable, defendants cannot avoid their duties under the law of the United States with respect to any right of plaintiff under the Jones Act. An advance waiver of this type is contrary to the provisions of 45 U.S.C.A. Section 688.")*(emphasis is the court's)..

Second, besides the *Rhoditis* precedent, I conclude that other policy considerations outweigh the application of the forum selection clause here and cause its application to be unreasonable even under the traditional *Bremen* analysis. Based on the undisputed facts admitted at oral argument, there was a complete imbalance in bargaining power in favor of the Defendant. This is not a case where the forum selection clause was negotiated by a union on Plaintiff's behalf. It was a "take it or leave it" employment contract. Either Plaintiff signed it "as is," or she did not have an opportunity to work for the

Defendant, even after multiple, prior cruises in the employment of Princess.[4] Moreover, Princess selected Bermuda law to apply because there are no comparable causes of action in Bermuda which are similar to the Jones Act or United States admiralty law for maintenance and cure. The purpose of the clause was to deprive Plaintiff of her Jones Act and maintenance and cure causes of action, regardless if she sued in Bermuda or Poland, and despite the Defendant's acknowledged base of operations in the United States.[5]

6. Defendant's Remaining Arguments

Princess also claims that Count I of Plaintiff's Complaint is procedurally improper because it re-alleges Plaintiff's maintenance and cure claim with the Jones Act claim. However, the failure to pay maintenance and cure is a proper basis for a Jones Act negligence claim. See *Garay v. Carnival Crusie Line, Inc.,* 904 F.2d 1527, 1533 (11th Cir. 1990)("A shipowner's failure to pay maintenance and cure may also support a cause of action under the Jones Act for breach of the party to provide maintenance and cure.").

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4. This is not to say that all non-negotiated forum selection clauses are unreasonable. But, taken that factor with the other factors discussed, I conclude that the forum selection clause here fails judicial scrutiny for fundamental fairness.

5. While I base my decision on the above analysis, I further note that, since January 2008, there is a statutory authority mandating that the FELA venue clause, 45 U.S.C. Section 56, be applied together with Title 45 U.S.C. Section 55, as it was in *Boyd v. Grand Truck W.R. Co.,* 338 U.S. 263 (1949) to prohibit any forum selection clause in a seaman's contract-regardless of whether the clause is joined with a choice of law clause that purports to mandate the application of a particular law other than the Jones Act. The amendment to the Jones Act deleted the venue clause in the Jones Act. Such action by Congress evidences its strong policy to protect seaman. Accordingly, seaman may rely on the FELA venue clause at 45 USC Section 56, and the federal cases interpreting it. Since a Jones Act seaman's legal rights are derived expressly from FELA, including the FELA venue clause, the *Boyd* decision, which prohibits enforcement of venue selection clauses for FELA workers, appears to apply in Jones Act cases to prohibit venue selection clauses, such as the one here, from being enforced.

Accordingly, the Defendant's argument lacks merit.

Plaintiff also has alleged negligence by the Defendant in failing to facilitate Plaintiff's receipt of insurance benefits under her insurance contract. Essentially, Plaintiff alleges that although Plaintiff was unaware of the availability of the coverage, and that Defendant was aware but did not timely inform her or file on her behalf (Complaint, Paragraphs 47, 56). The Defendant claims that Princess had no legal duty to provide the Plaintiff with a claim form because she never requested one. I find Defendant's argument to be premature at the motion to dismiss stage since there are sufficient facts alleged to support Plaintiff's estoppel type theory when a defendant's negligence has caused another to lose an important right, benefit, or expectancy. See *Bill Eyerly Ins. v. Gregory,* 727 So.2d 293 (Fla.5th DCA 1999)(cause of action against an insurance agent for negligent failure to forward an insurance claim to the insurer). Moreover, It is unclear at this juncture whether, and to what extent, the policy of insurance at issue imposes any duty on the shipowner to file a claim under the policy on the Plaintiff's behalf, or to what extent the shipowner assumed this duty by virtue of its relationship and communications with the insurance company. These matters await further discovery and motions for summary judgment, where appropriate.

WHEREFORE, it is **ORDERED** that the Defendant's Motion to Dismiss [DE 6] is **DENIED**. The Defendant shall answer the Complaint within twenty (20) days.

ORDERED this 5 day of August, 2008.

Alan S. Gold
United States District Judge

c.c.
Counsel via electronic filing